

5.10J EVIDENCE OF AND *PER SE* NEGLIGENCE (04/2016)

1. Violation of Administrative Regulation/Statute as Evidence of Negligence

In this case, the plaintiff, in support of the claim of negligence made, asserts that defendant violated a provision of the New Jersey Administrative Code/New Jersey Statutes [*whichever is applicable*]. The provision referred to as N.J.A.C./N.J.S.A. [*insert citation*] reads as follows:

. . .

The administrative regulation/statute has set up a standard of conduct. If you find that defendant has violated that standard of conduct, such violation is evidence to be considered by you in determining whether negligence, as I have defined that to you, has been established. You may find that such violation constituted negligence on the part of the defendant, or you may find that it did not constitute such negligence. Your findings on this issue may be based on such violation alone, but in the event that there is other or additional evidence bearing upon the issue, you will consider such violation together with all such additional evidence in arriving at your ultimate decision as to the defendant's negligence.

2. Violation of Administrative Regulation/Statute as Negligence *Per Se*

In this case, the plaintiff asserts that the defendant violated a provision of the New Jersey Administrative Code/New Jersey Statutes [*whichever is applicable*]. The provision referred to as N.J.A.C./N.J.S.A. [*insert citation*] reads as follows:

. . . .

The administrative regulation/statute has set up a standard of conduct. If defendant has violated this provision, such conduct is negligence on the defendant's part.

Cases:

The question of whether a jury should be instructed a statute or administrative regulation constitutes evidence of negligence or negligence *per se* is one to be determined by the court as a matter of law on a case by case basis. For cases which have held a regulation or statute was evidence of negligence, *see: Constantino v. Ventriglia*, 324 N.J. Super. 437 (App. Div. 1999), *certif. denied*, 163 N.J. 10 (2000) (OSHA regulations were evidence of the standard of care for the construction industry); *Braitman v. Overlook Terrace Corp.*, 68 N.J. 368 (1975) (holding failure to supply tenant deadbolts in violation of statute was evidence of negligence); *Frugis v. Bracigliano*, 177 N.J. 250 (2003) (noting violation of an administrative regulation requiring school rooms to have unobstructed safety-vision panels was evidence of negligence); *Parks v. Rogers*, 176 N.J. 491, 496, n. 1 (2003) (Supreme Court of New Jersey referenced provisions in the Uniform Construction Code Act and its subcode regarding handrails as evidential on the standard

of care); *Swank v. Halivopoulos*, 108 *N.J. Super.* 120 (App. Div. 1969), *certif. denied*, 55 *N.J.* 444 (1970) (Releases of the New Jersey Department of Health Concerning Administration of Oxygen held admissible in medical malpractice action); *Horbal v. McNeil*, 66 *N.J.* 99 (1974) (traffic regulations regarding speeding (*N.J.S.A.* 39:4-98) and right of way at intersections (*N.J.S.A.* 39:4-90) were evidence a jury could consider on the issues of negligence and contributory negligence).

For cases in which a statute or regulation constituted negligence *per se*, see: *Eaton v. Eaton*, 119 *N.J.* 628 (1990) (*N.J.S.A.* 39:4-97 incorporated a common law standard of care, thus a jury finding of a statutory violation was a finding of negligence; *Brehm v. Pine Acres Nursing Home*, 190 *N.J. Super.* 103 (App. Div. 1983) (violation of Nursing Home Bill of Rights, *N.J.S.A.* 30:13-8, constituted a cause of action against the person committing the violation). *Cf. Ptaszynski v. Atlantic Health Systems, Inc.*, 440 *N.J. Super.* 24 (App. Div. 2015) (*N.J.S.A.* 30:13-4.2 does not permit plaintiff to assert cause of action against nursing home for failure to comply with state or federal statutes as set forth in *N.J.S.A.* 30:13-3 (h)); *DiGiovanini v. Pessel*, 104 *N.J. Super.* 550 (App. Div. 1969), *aff'd in part, rev'd in part on other grounds*, 55 *N.J.* 188 (1970) (*N.J.S.A.* 30:4-30 set forth standard of conduct for physician certifying as to a person's insanity requiring physical examination, but court dismissed malpractice action due to failure to provide evidence of proximate cause).

Courts have also found statutes or regulations may not be used as evidence of negligence. For those cases see: *Reyes v. Egner*, 404 *N.J. Super.* 433 (App. Div. 2009), *aff'd.*, 201 *N.J.* 417 (2010) (*N.J.A.C.* 11:5-6.9 did not apply to "short-term rentals" and, therefore, was not evidential); *Badalamenti v. Simpkins*, 422 *N.J. Super.* 86 (App. Div. 2011) (while a violation of statute may be considered by a jury in determining negligence, it must be casually related); *Johnson v. Mountainside Hospital*, 239 *N.J. Super.* 312, 325 (App. Div. 1990) (*N.J.A.C.* 8:43B-6(a)(i) was a regulation stating an objective or aspiration, not a standard of care); *Zuidema v. Pedicano*, 373 *N.J. Super.* 135 (App. Div. 2004) (New Jersey Administrative Code provisions prohibiting physicians engaging in sexual relations with a patient not evidence of negligence because they did not constitute a

legitimate professional service and were not deemed a negligent act by the regulations); *Castro v. NYT Television*, 370 N.J. Super. 282 (App. Div. 2004) *aff'd in part, rev'd in part on other grounds*, 384 N.J. (1970) (the Hospital Patient's Bill of Rights Act, unlike the Nursing Home Residents' Bill of Rights Act, does not expressly authorize private causes of action).